

1 Steven D. Allison (CSB No. 174491)
sallison@crowell.com)
2 Samrah Mahmoud (CSB No. 285168)
smahmoud@crowell.com
3 CROWELL & MORING LLP
3 Park Plaza, 20th Floor
4 Irvine, CA 92614-8505
Telephone: 949.263.8400
5 Facsimile: 949.263.8414

6 Gregory D. Call (CSB No. 120483)
gcall@crowell.com
7 CROWELL & MORING LLP
275 Battery Street, 23rd Floor
8 San Francisco, CA 94111
Telephone: 415.986.2800
9 Facsimile: 415.986.2827

10 [Additional Counsel on Next Page]

11
12 **UNITED STATES DISTRICT COURT**
13 **SOUTHERN DISTRICT OF CALIFORNIA**

14 Rachel Smith, individually and on
15 behalf of all others similarly situated,

16 **Plaintiff,**

17 **v.**

18 Luxottica Retail North America, Inc.,
an Ohio corporation, dba
19 LensCrafters; Eyexam of California,
Inc., a California corporation,

20 **Defendants.**
21
22
23
24
25
26
27
28

Case No. 14CV0366 JAH (BLM)

Honorable John A. Houston
Courtroom 13B

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS LUXOTTICA
RETAIL NORTH AMERICA, INC.'S
AND EYEXAM OF CALIFORNIA,
INC.'S MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

[Notice of Motion filed concurrently]

Hon. John A. Houston
Courtroom: 13B
Hearing Date: August 3, 2015
Hearing Time: 2:30 p.m.

NO ORAL ARGUMENT REQUESTED

Operative Complaint Filed: May 4, 2015

1 Emily Kuwahara (CSB No. 252411)
2 ekuwahara @crowell.com
3 CROWELL & MORING LLP
4 515 South Flower St., 40th Floor
5 Los Angeles, CA 90071
6 Telephone: 213.622.4750
7 Facsimile: 213.622.2690

8 Attorneys for Defendants
9 Luxottica Retail North America Inc. dba LensCrafters
10 and EYEXAM of California, Inc.
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. BACKGROUND.....	3
III. LEGAL STANDARD	5
IV. ARGUMENT	6
A. Plaintiff (And The Eyewear Class) Lack Article III Standing To Pursue Claims Based On An Alleged Overpayment For Eyewear	6
1. Plaintiff fails to allege an injury in fact	7
2. Plaintiff fails to allege causation	8
B. Similarly Plaintiff (And The Eyewear Class) Lack Statutory Standing Under the UCL, FAL, and the CLRA To Pursue Claims Based on the Alleged Overpayment for Eyewear	10
C. Plaintiff Does Not Meet Article III or Statutory Standing Requirements for Her UCL “Unlawful” Claim	12
1. Plaintiff cannot connect her purchase of an allegedly non-comprehensive eye exam to Defendants’ unlawful conduct.....	12
2. Purchasing an eye exam that Defendants were allegedly prohibited from selling does not establish standing	15
D. Plaintiff Fails to Establish Any Likelihood of Future Injury as Required for Injunctive Relief Under Article III	16
E. Plaintiff Fails to State a CLRA, FAL, or UCL “Unfair” or “Fraudulent” Claim With Particularity	17
F. Plaintiff’s Misrepresentation Claims Should be Dismissed to The Extent They Rely on Alleged Misrepresentations Regarding Comprehensive Eye Exams	19
V. CONCLUSION	21

TABLE OF AUTHORITIES

	Page
Cases	
<i>Animal Legal Def. Fund v. Mendes</i> , 160 Cal. App. 4th 136 (2008).....	15
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	5
<i>Backhaut v. Apple, Inc.</i> , No. 14-CV-00285-LHK, 2014 WL 6601776 (N.D. Cal. Nov. 19, 2014).....	11
<i>Brazil v. Dole Food Co.</i> , 935 F. Supp. 2d 947 (N.D. Cal. 2013).....	18
<i>Brod v. Sioux Honey Ass’n, Co-op</i> , 927 F. Supp. 2d 811 (N.D. Cal. 2013).....	20
<i>Burns v. Tristar Prods., Inc.</i> , No. 14-cv-749-BAS (DHB), 2014 WL 3728115 (S.D. Cal. July 25, 2014).....	16
<i>Cafasso, U.S. ex rel. v. General Dynamics C4 Sys., Inc.</i> , 637 F.3d 1047 (9th Cir. 2011).....	6
<i>Castagnola v. Hewlett-Packard Co.</i> , No. C 11-05772 JSW, 2012 WL 2159385 (N.D. Cal. June 13, 2012).....	17
<i>City of Los Angeles v. Lyons</i> , 461 U.S. 95 (1983)	5, 16
<i>Cullen v. Netflix, Inc.</i> No. 5:11-CV-01199-EJD, 2013 WL 140103 (N.D. Cal. Jan. 10, 2013).....	12
<i>DaimlerChrysler Corp v. Cuno</i> , 547 U.S. 332 (2006)	5, 12
<i>Drucker v. State Bd. Of Med. Exam’rs</i> , 143 Cal. App. 2d 702 (1956)	14

TABLE OF AUTHORITIES

(continued)

	Page
<i>Ford v. Hotwire, Inc.</i> , No. C-07-CV-1312 H (NLS), 2008 WL 5874305 (S.D. Cal. Feb. 25, 2008)	19
<i>Frenzel v. AliphCom</i> , ___ F. Supp. 3d ___, No. 14-cv-03587-WHO, 2014 WL 7387150 (N.D. Cal., Dec. 29, 2014)	6, 17, 18
<i>Hoang v. Vinh Phat Supermarket, Inc.</i> , No. CIV. 2:13-00724 WBS GGH, 2013 WL 4095042 (E.D. Cal. Aug. 13, 2013)	20
<i>Johnson v. Wells Fargo Home Mortg. Inc.</i> , No. EDCV 13-01044-VAP, 2013 WL 7211905 (C.D. Cal. Sept. 13, 2013)	20
<i>Kane v. Chobani Inc.</i> , No. 12-CV-02425-LHK, 2013 WL 5289253 (N.D. Cal. Sept. 19, 2013)	11, 15
<i>Kearns v. Ford Motor Co.</i> , 567 F.3d 1120 (9th Cir. 2009)	passim
<i>Kwikset Corp. v. Super. Ct.</i> , 51 Cal. 4th 310 (2011)	10, 15
<i>Lavie v. Procter & Gamble Co.</i> , 105 Cal. App. 4th 496 (2003)	19
<i>Lewis v. Casey</i> , 518 U.S. 343 (1996)	6
<i>Lorenzo v. Qualcomm Inc.</i> , No. 08CV2124 WQH (LSP), 2009 WL 2448375 (S.D. Cal. Aug. 10, 2009)	12
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	6

TABLE OF AUTHORITIES
(continued)

	Page
<i>Pelayo v. Nestle USA, Inc.</i> , 989 F. Supp. 2d 973 (C.D. Cal. 2013).....	20
<i>Stickrath v. Globalstar, Inc.</i> , 527 F. Supp. 2d 992 (N.D. Cal. 2007).....	16
<i>Two Jinn, Inc. v. Gov’t Payment Serv., Inc.</i> , No. 09CV2701JLS (BLM), 2010 WL 1329077 (S.D. Cal. April 1, 2010).....	8
<i>Vess v. Ciba-Geigy Corp. USA</i> , 317 F.3d 1097 (9th Cir. 2003).....	6, 19
<i>In re Vioxx Class Cases</i> , 180 Cal. App. 4th 116 (2009).....	11
<i>Warren v. Fox Family Worldwide, Inc.</i> , 328 F.3d 1136 (9th Cir. 2003).....	5
<i>Wash. Envtl. Council v. Bellon</i> , 732 F.3d 1131 (9th Cir. 2013).....	7
<i>White v. Lee</i> , 227 F.3d 1214 (9th Cir. 2000).....	5, 16
<i>Zivkovich v. Vatican Bank</i> , 242 F. Supp. 2d 659 (N.D. Cal. 2002).....	7
Statutes	
Cal. Bus. & Prof. Code § 655	4
Cal. Bus. & Prof. Code § 2544	14, 20
Cal. Bus. & Prof. Code § 2556	4, 13, 14
Cal. Bus. & Prof. Code § 3040	14
Cal. Bus. & Prof. Code § 3041	14
Cal. Bus. & Prof. Code § 17200	<i>passim</i>

TABLE OF AUTHORITIES
(continued)

	Page
Cal. Bus. & Prof. Code § 17204	11
Cal. Bus. & Prof. Code § 17500	<i>passim</i>
Cal. Bus. & Prof. Code § 17535	11
Cal. Civ. Code § 1750.....	<i>passim</i>
Cal. Code Regs., tit. 16, § 1399.251	4, 14
Cal. Code Regs., tit. 16, § 1514	4, 14
Cal. Health & Safety Code § 1368, <i>et seq.</i>	15
Other Authorities	
16 C.F.R. § 315.3	9
16 C.F.R. § 456.2	9
Fed. R. Civ. P. 9(b)	<i>passim</i>
Fed. R. Civ. P. 12(b)(1)	5
Fed. R. Civ. P. 12(b)(6)	5

1 **I. INTRODUCTION**

2 In an amended complaint long on words but short on substance, Plaintiff
3 again challenges the legality of the LensCrafters business model because consumers
4 are able to “obtain on-site eye examinations and purchase their corresponding
5 prescription eyewear” in LensCrafters locations. (First Am. Compl. (“FAC”) ¶ 5,
6 Doc. No. 24.) Plaintiff’s original complaint named only Luxottica Retail North
7 America, Inc. (“LRNA”) and asserted claims under California’s Unfair Competition
8 Law (“UCL”), California Business & Professions Code section 17200 *et seq.*, and
9 the Consumer Legal Remedies Act (“CLRA”), California Civil Code section 1750
10 *et seq.*, based on alleged violations of various statutes that purportedly prohibit
11 “combined optometrist-optician operation[s].” (Not. Of Removal, Ex. A (“Original
12 Compl.”) ¶¶ 34-48, Doc. No. 1-2.) Plaintiff alleged that she was harmed because
13 she underwent an eye exam at a LensCrafters location and then purchased and
14 overpaid for the recommended eyewear. (Original Compl. ¶¶ 31-32.) The original
15 complaint was dismissed in its entirety by this Court because Plaintiff failed to
16 establish Article III and statutory standing. (Order Granting Defs.’ Mot. to Dismiss
17 (“Order”) at 7, Doc. No. 23.)

18 Plaintiff now makes an equally unpersuasive attempt to state claims against
19 LRNA, and for the first time, EYEXAM of California, Inc. (“EECA”), the
20 healthcare services plan that employs the optometrists at LensCrafters. This time,
21 Plaintiff’s FAC throws in an additional claim under California’s False Advertising
22 Law and focuses on Defendants’ advertising of “Independent Doctors of
23 Optometry” and the importance of eye exams for eye health. (*See* FAC ¶¶ 56-57,
24 69, 126-32.) Plaintiff alleges that these advertisements “lure” consumers to
25 LensCrafters on the belief they will receive a comprehensive eye exam from an
26 independent optometrist, which she claims they do not in fact receive. (*Id.* ¶ 69.)
27 She further alleges that once at LenCrafters for an eye exam, consumers purchase
28 overpriced eyewear. (*Id.* ¶ 78.) Plaintiff seeks to pursue her claims on behalf of

1 two distinct subclasses—(1) those who purchased an eye exam from an optometrist
2 at a LensCrafters in California (“Eye Exam Class”), and (2) those who purchased
3 for personal use eyewear at a LensCrafters in California using a prescription
4 generated by an eye exam that occurred at a LensCrafters in California (“Eyewear
5 Class”). (*Id.* ¶¶ 13.1-13.2.)

6 Plaintiff, however, lacks standing for most of her claims and otherwise fails
7 to state claims against Defendants. Plaintiff’s FAC should therefore be dismissed
8 for the following reasons:

9 First, Plaintiff and the Eyewear Class still lack Article III and statutory
10 standing under the UCL, CLRA, and FAL to pursue claims based on their alleged
11 overpayment for eyewear. Plaintiff speculates that she would have “availed herself
12 of the open market for prescription eyewear” and paid “at least \$76.56 less” had she
13 not been in LensCrafters for an eye exam. (*Id.* ¶ 97.) Plaintiff bases this number on
14 an unscientific survey of four online retailers (*see id.* ¶¶ 96-97), but she never
15 alleges that she would have purchased eyewear at any of these online retailers or at
16 any other retailer that charges less than Defendants. Further, Plaintiff fails to allege
17 facts plausibly connecting Defendants’ advertising or business model to its
18 purported ability to overcharge consumers for eyewear, nor does she allege facts
19 plausibly establishing that Defendants’ advertising or business model *caused her* to
20 overpay for eyewear. Plaintiff (and the Eyewear Class) therefore fails to allege
21 injury or causation for Article III or statutory standing; Plaintiff also fails to allege
22 lost money or property as required for standing under the UCL or FAL.

23 Second, Plaintiff lacks Article III and statutory standing for her UCL
24 “unlawful” claim. Plaintiff alleges that her *sole* motivation for coming to
25 LensCrafters and purchasing an eye exam was her expectation—based on
26 Defendants’ advertisements of “independent doctors of optometry” and the
27 importance of eye exams for eye health—that she would receive a comprehensive
28 eye exam from an independent optometrist. (*Id.* ¶¶ 81-83.) But Plaintiff alleges no

1 facts establishing that these advertisements are unlawful, and her allegations
2 establish the contrary. Indeed, there are no legally prescribed minimum standards
3 for an eye exam in California. Thus, Plaintiff does not connect her alleged harm in
4 paying for an eye exam to Defendants’ purported *unlawful* conduct.

5 Third, Plaintiff lacks Article III standing for injunctive relief. Plaintiff’s
6 prayer for injunctive relief was previously dismissed by this Court because Plaintiff
7 did not allege a likelihood of future injury. (Order at 7.) Plaintiff makes no efforts
8 to address this deficiency in her FAC, and her prayer for injunctive relief should
9 again be dismissed.¹

10 Fourth, Plaintiff fails to plead her CLRA, FAL, and UCL “unfair” and
11 “fraudulent” claims (the “misrepresentation claims”)—all which sound in fraud—
12 with particularity under Rule 9(b). Plaintiff does not allege which advertisements
13 she viewed, when she viewed them, and what specifically they said.

14 Fifth, the misrepresentation claims also fail to the extent Plaintiff alleges she
15 was misled into believing she would receive a comprehensive eye exam from
16 Defendants’ advertisements about eye health. Plaintiff fails to plausibly allege that
17 a reasonable consumer would (1) believe they would receive a “comprehensive eye
18 exam” after viewing these advertisements, which never used the word
19 “comprehensive”; or (2) attribute the same complex meaning to the phrase
20 “comprehensive eye exam” as Plaintiff does.

21 Thus, all of Plaintiff’s claims remain defective for one reason or another. As
22 a result, her complaint should be dismissed, and this time with no leave to amend.

23 **II. BACKGROUND**

24 Plaintiff filed her FAC on May 4, 2015. The FAC asserts the following

25
26 ¹ By moving to dismiss on particular grounds such as lack of standing,
27 Defendants do not concede that Plaintiff’s underlying claims have merit.
28

1 claims against Defendants for both an Eye Exam and an Eyewear Class:

2 (1) violation of the UCL for “unlawful” business practices; (2) violation of the UCL
3 for “fraudulent” business practices; (3) violation of the UCL for “unfair” business
4 practices; (4) violation of California’s False Advertising Law (“FAL”), California
5 Business and Professions Code section 17500; and (5) violation of the CLRA.
6 (FAC ¶¶ 13.1-13.2, 98-142.5.)

7 California law restricts certain business and financial relationships between
8 optometrists and opticians and regulates the advertising of optometric services. *See*
9 Cal. Bus. & Prof. Code § 655, 2556;² Cal. Code Regs., tit. 16, §§ 1514, 1399.251.
10 Plaintiff again alleges that Defendants violate California law by allowing
11 consumers to obtain eye exams and purchase prescription eyewear in the same
12 retail location. (FAC ¶ 105.1-105.2.) Plaintiff now also alleges that Defendants’
13 advertising of “independent doctors of optometry” and the importance of eye exams
14 for eye health (1) violates various California statutes and regulations; and (2)
15 misleads consumers into believing they will receive a “comprehensive eye exam”
16 from a “truly ‘Independent Doctor[] of Optometry,” which they allegedly do not
17 receive. (*Id.* ¶ 69.)

18 Plaintiff vaguely claims that she viewed Defendants’ advertisements and
19 formed the expectation she would receive a comprehensive eye exam from a
20 “wholly independent” optometrist. (*Id.* ¶¶ 81, 88.) Plaintiff claims this was her
21 sole motivation for coming to LensCrafters for an eye exam. (*Id.* ¶ 83.) She
22 alleges that she did not receive what she paid for because her exam was hurried and
23 performed by an optometrist who was not “truly independent,” and because parts of
24 the exam were performed by a lay employee. (FAC ¶¶ 85, 90, 102.) She also
25

26 ² Parties have litigated aspects of sections 655 and 2556, but no court or
27 regulatory body has ruled that a business model like Defendants’ is unlawful.
28

1 alleges that she purchased overpriced eyewear at LensCrafters because she was in
2 the store, her optometrist recommended LensCrafters eyewear, and she was given a
3 discount. (*Id.* ¶¶ 94-95.)

4 **III. LEGAL STANDARD**

5 A court must dismiss an action for lack of subject matter jurisdiction where a
6 plaintiff fails to establish Article III standing. Fed. R. Civ. P. 12(b)(1); *Warren v.*
7 *Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003); *White v. Lee*,
8 227 F.3d 1214, 1242 (9th Cir. 2000). Standing is a threshold issue and must be
9 proven for each claim and form of relief sought. *See City of Los Angeles v. Lyons*,
10 461 U.S. 95, 101 (1983); *see also DaimlerChrysler Corp v. Cuno*, 547 U.S. 332,
11 352 (2006).

12 A court must also dismiss a complaint where the complaint fails to “contain
13 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible
14 on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic*
15 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); Fed. R. Civ. P. 12(b)(6). When
16 considering a Rule 12(b)(6) motion, a Court must accept all factual allegations as
17 true, but need not accept unreasonable inferences or legal conclusions cast in the
18 form of factual allegations. *See Iqbal*, 556 U.S. at 681 (formulaic recitation of
19 elements of claim are not entitled to assumption of truth). To establish a plausible
20 claim for relief, a plaintiff must “plead[] factual content that allows the court to
21 draw the reasonable inference that the defendant is liable for the misconduct
22 alleged.” *Id.* at 678. Thus, “[t]hreadbare recitals of the elements of a cause of
23 action, supported by mere conclusory statements, do not suffice.” *Id.*

24 Moreover, Rule 9(b)’s heightened pleading standard applies where a
25 plaintiff’s claims sound in fraud. Courts in the Ninth Circuit have applied Rule
26 9(b) to CLRA, FAL, and UCL claims where a plaintiff has “allege[d] a unified
27 course of fraudulent conduct and rel[ies] entirely on that course of conduct as the
28 basis of that claim.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir.

2009) (applying Rule 9(b) to UCL and CLRA claims sounding in fraud) (alteration in original) (citation and internal quotation marks omitted); *Frenzel v. AliphCom*, ___ F. Supp. 3d ___, No. 14-cv-03587-WHO, 2014 WL 7387150, at *7 (N.D. Cal., Dec. 29, 2014) (applying Rule 9(b) to UCL, CLRA, and FAL claims sounding in fraud). Even where a plaintiff has not alleged a unified course of fraudulent conduct, the plaintiff must still plead allegations of fraud with particularity. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003). Under Rule 9(b), “averments of fraud must be accompanied by ‘the who, what, when, where, and how’ of the misconduct charged,” *id.* at 1106 (citation omitted), as well as “what is false or misleading about [the purportedly fraudulent] statement, and why it is false,” *Cafasso, U.S. ex rel. v. General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (alteration in original) (citation and internal quotation marks omitted).

IV. ARGUMENT

A. Plaintiff (And The Eyewear Class) Lack Article III Standing To Pursue Claims Based On An Alleged Overpayment For Eyewear.

To establish Article III standing, a plaintiff must allege an “injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent not conjectural or hypothetical.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citation and internal quotation marks omitted). Consequently, “named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.” *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (citations and internal quotation marks omitted).

Plaintiff must also show that this alleged injury was *caused* by Defendants’ challenged conduct. *Lujan*, 504 U.S. at 560 (“[T]here must be a causal connection between the injury and the conduct complained of . . .”). This “requirement []

1 demands [p]laintiff show [sic] each link in the causal chain between the defendant
2 and the asserted injury.” *Zivkovich v. Vatican Bank*, 242 F. Supp. 2d 659, 670
3 (N.D. Cal. 2002). The links in a causal chain must not be ““hypothetical or tenuous
4 and [must] remain plausible.”” *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131,
5 1141-42 (9th Cir. 2013) (quoting *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696
6 F.3d 849, 867 (9th Cir. 2012)).

7 The Court previously dismissed Plaintiff’s complaint after finding that
8 Plaintiff failed to “allege a concrete or particularized injury to support Article III
9 standing.” (Order at 7.) Despite adding more words, Plaintiff has not corrected
10 these problems.

11 **1. Plaintiff fails to allege an injury in fact.**

12 Plaintiff again fails to satisfy Article III standing requirements for claims
13 based on the purchase of higher priced eyewear because she fails to establish that
14 she suffered an injury in fact. Plaintiff does not allege that Defendants’ advertising
15 or business model caused her to purchase eyewear when she otherwise would not
16 have purchased eyewear at all. Rather, her sole claim of injury is that, had she not
17 been at LensCrafters, she “would have availed herself of the open market for
18 prescription eyewear” and supposedly paid less for the eyewear she purchased.
19 (FAC ¶ 97.)

20 But Plaintiff does not even allege which eyewear she purchased, nor does she
21 allege facts that establish she could have purchased that same eyewear somewhere
22 else. Plaintiff suggests that her optometrist recommended “Advanced View
23 Progressive Lenses” that were “exclusive to LensCrafters.” (*Id.* ¶ 95.) If these
24 exclusive lenses were indeed the lenses that Plaintiff bought, then she could not
25 have purchased the same lenses elsewhere. Moreover, there is no allegation that
26 Plaintiff had to purchase these lenses, or that there were no equivalent substitutes.

27 Nor does Plaintiff allege facts establishing that she could have and would
28 have purchased equivalent eyewear for less on the “open market.” While she

1 alleges prices at which she could have purportedly purchased “the same model
2 frames . . . and lenses” for less at four specific online retailers, (*Id.* ¶¶ 96-96.4),
3 nowhere does she allege that she would have actually purchased her eyewear from
4 these online retailers. Nor does she allege that she could have or would have paid
5 less at a comparable brick and mortar store.³ Indeed, given the unique nature of
6 prescription glasses, which must be made to match each customer, such
7 comparisons improperly treat prescription glasses as mere commodities without any
8 factual basis.

9 Plaintiff’s “overcharge” theory is therefore too simplistic and theoretical to
10 establish injury-in-fact, and she therefore lacks standing to pursue claims for the
11 Eyewear Class. *See Two Jinn, Inc. v. Gov’t Payment Serv., Inc.*, No.
12 09CV2701JLS (BLM), 2010 WL 1329077, at *3-4 (S.D. Cal. April 1, 2010)
13 (dismissing FAL and UCL claims for lack of Article III standing where plaintiff
14 alleged attenuated theory of competitive harm).

15 **2. Plaintiff fails to allege causation.**

16 Further, even if Plaintiff had pleaded that she was overcharged for her
17 eyewear, she again fails to plausibly explain how this alleged harm resulted from
18 the conduct she complains of—namely Defendants’ advertising of “independent
19 doctors of optometry” and their business model. Plaintiff speculates that by
20 “lur[ing]” consumers into LensCrafters with “on-site examinations from supposedly
21 ‘Independent’ doctors,” Defendants are able to “fleece LensCrafters customers . . .
22

23 ³ Common sense dictates that the prices a business charges to consumers
24 reflect a variety of components such as overhead costs, profit margins, and the price
25 of input materials. There mere difference in price between competitors proves
26 nothing, and certainly does not establish that one party’s conduct is illegal, unfair,
27 or fraudulent.
28

1 into paying exorbitantly high prices for their prescription eyewear.” (FAC ¶ 78.)
2 She complains that consumers’ decisions to purchase eyewear are “heavily
3 influenced by their optometrists’ recommendations and sales pressures” because
4 optometrists often recommend that consumers “strongly consider proprietary
5 features that only LensCrafters sells.” (FAC ¶¶ 75.2, 78.)

6 Plaintiff provides no facts, however, that plausibly connect Defendants’
7 complained of conduct to its purported ability to overcharge consumers for
8 eyewear. Plaintiff does not allege, for instance, that Defendants tie the receipt of an
9 eye exam to consumers’ eyewear purchase or that they otherwise prevent
10 consumers from filling their prescriptions elsewhere⁴ or from comparison shopping
11 eyewear online as Plaintiffs’ attorneys have done.⁵ She does not allege that
12 Defendants misrepresented they had the lowest price on the market; in fact, she
13 complains that Defendants do *not* advertise competitive prices. (*Id.* ¶ 73.) That
14 optometrists might recommend particular eyewear does not establish that
15 Defendants’ business model or their advertising allows them to overcharge
16 consumers, particularly when the consumers can compare prices and take their
17 prescription elsewhere to buy glasses.

18 Nor does Plaintiff allege that Defendants’ advertising or business model
19 *caused her* to purchase overpriced eyewear. Plaintiff alleges three reasons for
20 _____

21 ⁴ Federal regulations require optometrists to release prescriptions for
22 corrective lenses to patients, whether or not requested, so that patients can purchase
23 their prescription wherever they choose. *See* 16 C.F.R. §§ 315.3, 456.2. Plaintiff
24 does not allege that these regulations were violated or that her prescription was not
25 released to her.

26 ⁵ In fact, with the advent of smart phones, most consumers can compare
27 prices for products online while they are in-store shopping.
28

1 purchasing her eyewear: (1) she was offered an “illusory 40% discount on her
2 lenses *and* frames”; (2) she was already in the store for a “comprehensive eye exam
3 from an ‘Independent Doctor of Optometry’”; and (3) her optometrist “noted the
4 potential need for follow-up care, the importance of the AccuFit system . . . , and
5 that the recommended ‘Advanced View Progressive’ lenses were exclusive to
6 LensCrafters.” (See FAC ¶¶ 94-95 (emphasis in original).) But Plaintiff offers no
7 *facts* establishing that the 40% discount was illusory or improper; nor does she
8 allege any connection between the discount and Defendants’ practice of offering
9 eye exams and eye wear at LensCrafters and advertising “independent doctors of
10 optometry.”

11 She also fails to explain how her optometrist’s statements caused her to
12 overpay for her eyewear when she was free to take her prescription elsewhere or
13 compare prices before purchasing. Plaintiff does not allege that Defendants or her
14 optometrist represented that LensCrafters had the lowest prices for eyewear—or
15 that the optometrist talked about price at all.⁶

16 Plaintiff and the Eyewear Class therefore lack Article III standing.

17 **B. Similarly Plaintiff (And The Eyewear Class) Lack Statutory**
18 **Standing Under the UCL, FAL, and the CLRA To Pursue Claims**
19 **Based on the Alleged Overpayment for Eyewear.**

20 Plaintiff (and the Eyewear Class) also fail to establish standing under the

21 ⁶ If Plaintiff’s claims are based on allegations that Defendants concealed
22 information, Plaintiff also lacks standing. Plaintiff alleges no facts giving rise to a
23 duty to disclose. See *Kane v. Chobani Inc.*, No. 12-CV-02425-LHK, 2013 WL
24 5289253, at *9 n.6 (N.D. Cal. Sept. 19, 2013) (dismissing CLRA and UCL claims
25 for lack of standing where claims were based on defendant’s failure to disclose its
26 alleged non-compliance with labeling laws and plaintiff had not “alleged that
27 Defendant had a duty to disclose or identified the basis for this duty”).
28

1 UCL, FAL, and CLRA. *See Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 324
2 (2011) (noting that UCL and FAL standing requirements are more stringent than
3 Article III standing). To have standing under the UCL or FAL, a private individual
4 must have “suffered [an] injury in fact and [] lost money or property *as a result of*
5 the unfair competition.” Cal. Bus. & Prof. Code § 17204 (emphasis added); *id.* §
6 17535. Similarly, under the CLRA, plaintiffs must “show not only that a
7 defendant’s conduct was deceptive but that the deception *caused* them harm.” *In re*
8 *Vioxx Class Cases*, 180 Cal. App. 4th 116, 129 (2009) (emphasis added) (quoting
9 *Mass. Mut. Life Ins. Co. v. Super. Ct.*, 97 Cal. App. 4th 1282, 1292 (2002)). Thus,
10 Plaintiff must show that Defendants—by advertising independent doctors of
11 optometry and enabling consumers to purchase eye exams and eyewear in the same
12 location—*caused* her to lose money or property.

13 The Court previously dismissed Plaintiff’s claims after finding that Plaintiff
14 “fail[ed] to sufficiently allege economic injury to establish standing under the UCL
15 and CLRA.” (Order at 7.)

16 For the reasons discussed above, Plaintiff again fails to allege not only
17 economic injury (*i.e.*, that she lost money or property), but that such harm was
18 caused by Defendants’ advertising or business model. Plaintiff pleads only
19 conclusory allegations that she overpaid for her eyewear. She further fails to plead
20 facts that plausibly connect Defendants’ advertising or business model to (1) its
21 ability to allegedly overcharge consumers for their eyewear, or (2) Plaintiff’s own
22 alleged overpayment for her eyewear.

23 Federal courts have routinely dismissed UCL, FAL, and CLRA claims
24 where, as here, those claims are supported only by conclusory or speculative
25 causation allegations. *See, e.g., Backhaut v. Apple, Inc.*, No. 14-CV-00285-LHK,
26 2014 WL 6601776, at *10 (N.D. Cal. Nov. 19, 2014) (dismissing CLRA and UCL
27 claims where “[p]laintiffs [] failed to allege that they overpaid for their Apple
28 devices in reliance on misrepresentations, omissions, or other wrongful conduct by

1 Apple”); *Cullen v. Netflix, Inc.* No. 5:11-CV-01199-EJD, 2013 WL 140103, at *4
2 (N.D. Cal. Jan. 10, 2013) (dismissing CLRA, UCL, and FAL claim based on
3 “unsubstantiated assertions” of causation); *Lorenzo v. Qualcomm Inc.*, No.
4 08CV2124 WQH (LSP), 2009 WL 2448375, at *6 (S.D. Cal. Aug. 10, 2009)
5 (holding that plaintiff lacked standing to bring his claims because he had “not
6 allege[d] any facts to support a finding that [he] paid more for [his] phone than a
7 comparable phone as a result of [the defendant’s] unlawful, unfair and/or fraudulent
8 conduct”). As detailed above, Plaintiff does not allege, for instance, that she was
9 forced into buying eyewear at LensCrafters, that she was restricted from pricing or
10 purchasing eyewear at other locations, or that Defendants made any
11 misrepresentations about having the lowest priced eyewear.

12 Plaintiff’s (and the Eyewear Class’s) claims therefore must be dismissed for
13 lack of statutory standing.

14 **C. Plaintiff Does Not Meet Article III or Statutory Standing**
15 **Requirements for Her UCL “Unlawful” Claim.**

16 Plaintiff also lacks standing to pursue a UCL “unlawful” claim. *Daimler*
17 *Chrysler Corp*, 547 U.S. at 352 (standing must be proven for each claim). Because
18 Plaintiff alleges neither injury nor causation for her eyewear purchase, Plaintiff’s
19 remaining theories of injury relate to her purchase of an eye exam. First, Plaintiff
20 appears to allege that she was harmed because she paid for an eye exam with the
21 expectation—based on Defendants’ advertisements—that she would receive a
22 comprehensive eye exam from an independent optometrist, which she did not
23 receive. (*Id.* ¶¶ 81, 93.2-93.4.) Second, Plaintiff contends that she paid for an eye
24 exam that Defendants were “not legally permitted to sell.” (FAC ¶ 93.1). Neither
25 of these theories supports Article III or statutory standing requirements.

26 **1. Plaintiff cannot connect her purchase of an allegedly non-**
27 **comprehensive eye exam to Defendants’ unlawful conduct.**

28 Plaintiff’s first theory of injury, that she purchased a non-comprehensive eye
exam from a non-independent optometrist, fails to establish Article III or statutory

1 standing because Plaintiff does not allege that Defendants’ *unlawful* conduct *caused*
2 this harm. Stated differently, Plaintiff does not allege that she came to LensCrafters
3 for an eye exam because she was able to purchase both her eye exam and eyewear
4 there.

5 Rather, Plaintiff alleges that her “*sole* motivation for coming to LensCrafters
6 . . . *and purchasing an eye exam*” was her expectation that she would receive a
7 comprehensive eye exam from an independent doctor of optometry. (FAC ¶ 83
8 (emphasis added); *see also id.* ¶ 94 (“Had Plaintiff not come to LensCrafters based
9 on Defendants’ representations that she could get a comprehensive eye exam from a
10 truly independent doctor of optometry at the LensCrafters location, Plaintiff would
11 have had no other reason to come to LensCrafters for any purpose”).) Plaintiff
12 alleges that she developed this expectation after viewing Defendants’
13 advertisements “regarding the availability of comprehensive eye examinations from
14 ‘Independent Doctors of Optometry’ employed by ‘Eyexam of California, Inc.’”
15 (*Id.* ¶ 81.) She acknowledges that “each time the phrases ‘Independent Doctor of
16 Optometry’ and ‘eye exam’ are used on LensCrafters’ website” they bear an
17 asterisk that explicitly states LensCrafters *does not* “provide eye exams or employ
18 doctors of optometry” and that eye exams “are available at LensCrafters locations
19 from licensed optometrists employed by EYEXAM of California, a licensed vision
20 health care services plan.” (*Id.* ¶ 35.)⁷

21 Plaintiff makes no attempt to explain how these particular advertisements—
22 which created her sole motivation to come to LensCrafters and purchase an eye
23 exam—are unlawful. LRNA does not advertise the “furnishing of” an optometrist’s
24 services in violation of California Business and Professions Code section 2556 or
25

26 ⁷ Plaintiff does not appear to, and cannot, challenge EYEXAM’s ability as a
27 licensed vision health care services plan to employ optometrists.
28

1 California Code of Regulations title 16 section 1399.251; the LensCrafters’
2 advertisements explicitly state that licensed optometrists employed by EECA
3 provide those exams.⁸ Nor do they (1) advertise or hold themselves out as
4 optometrists in violation of California Business and Professions Code section 3040;
5 or (2) “link[] [an] optometrist’s name, or practice, in advertising or in any other
6 manner with that of the commercial (mercantile) concern from whom he/she is
7 leasing space” in violation of California Code of Regulations, title 16, section 1514.
8 Plaintiff pleads no facts to suggest otherwise.

9 Further, Plaintiff also lacks standing to the extent she contends she did not
10 receive a comprehensive eye exam because Defendants violate California Business
11 and Professions Code sections 3040 and 3041 by having lay employees assist with
12 exams (FAC ¶ 85, 102). Plaintiff alleges—without any detail—that “[c]ritical
13 aspects of the exam were performed by a lay employee of LRNA.” (*Id.*) Notably,
14 Plaintiff does not explain which aspects were performed by a lay employee; this is
15 likely because California Business and Professions Code section 2544 *explicitly*
16 *allows* an assistant under the “direct responsibility and supervision of an
17 ophthalmologist or optometrist” to perform tonometry, lensometry, automated
18 visual field testing, and other “simple noninvasive testing of visual acuity, pupils,
19 and ocular motility.” Plaintiff therefore alleges no *facts* to establish that
20

21 ⁸ Indeed, in *Drucker v. State Bd. Of Med. Exam’rs*, the Court of Appeal
22 approved of the trial court’s determination that “furnish” as used in section 2556
23 means that a non-optometrist “provid[es] [optometrist’s] services either
24 gratuitous[ly] or for a fee.” 143 Cal. App. 2d 702,711 (1956) (internal quotation
25 marks omitted). So to advertise the furnishing of an optometrist’s services,
26 Defendant LRNA would need to advertise that it provides optometric services.
27 LRNA does exactly the opposite here.
28

1 Defendants violated California law by allowing lay employees to assist with
2 exams.⁹

3 Plaintiff therefore fails to plausibly connect her alleged harm in paying for an
4 eye exam to Defendants' *unlawful* conduct.

5 **2. Purchasing an eye exam that Defendants were allegedly**
6 **prohibited from selling does not establish standing.**

7 Plaintiff also fails to establish standing to pursue a UCL "unlawful" claim
8 based on her purchase of an eye exam that Defendants were allegedly "not legally
9 permitted to sell." (FAC ¶ 93.1).

10 First, this "injury" is insufficient for statutory standing. Courts have rejected
11 standing theories based solely on illegality and "moral injury" because it would, if
12 accepted, "eviscerate the enhanced standing requirements imposed by . . . [the
13 UCL] and the Supreme Court's decision in *Kwikset*." *Kane*, 2013 WL 5289253, at
14 *9 (dismissing UCL and FAL claim for lack of standing where plaintiffs relied
15 solely on allegations that they "would not have purchased a product that was
16 misbranded"); *Animal Legal Def. Fund v. Mendes*, 160 Cal. App. 4th 136, 146-47
17 (2008) (holding plaintiffs lacked standing where they alleged they purchased
18 products on assumption they were "being produced in accordance with California
19 law"; plaintiffs received economic benefit of their bargain).

20 Second, Plaintiff fails to articulate how Defendants' advertising caused her to
21 purchase an eye exam that Defendants allegedly sold illegally. As noted above,
22 Plaintiff alleges that she purchased an eye exam solely because she expected a
23 comprehensive eye exam from an independent optometrist. (FAC ¶¶ 81-83.)
24 Plaintiff does not allege that Defendants affirmatively misrepresented the legality of

25 ⁹ If Plaintiff were truly concerned about any part of her eye exam she could
26 have availed herself of EECA's statutorily-mandated grievance process. *See* Cal.
27 Health & Safety Code § 1368, *et seq.* Notably, she did not.
28

1 their business model, nor does she allege that Defendants had a duty to disclose
2 specifics about their business model and compliance with California Business and
3 Professions Code sections. Simply put, Plaintiff does not allege that the structure
4 of Defendants' operations caused her to obtain an eye exam or purchase lenses.

5 Plaintiff therefore does not have statutory or Article III standing to pursue a
6 UCL "unlawful" claim.

7 **D. Plaintiff Fails to Establish Any Likelihood of Future Injury as**
8 **Required for Injunctive Relief Under Article III.**

9 Additionally, Plaintiff lacks standing under Article III to pursue her claim for
10 injunctive relief because she again fails to allege a "likelihood of future injury."
11 *See White*, 227 F.3d at 1242 (internal quotation marks omitted). To seek injunctive
12 relief, a plaintiff must show more than a past wrong but a "sufficient likelihood that
13 he will again be wronged in a similar way." *Lyons*, 461 U.S. at 103, 111.

14 In its March 23, 2015 Order dismissing Plaintiff's Complaint, the Court
15 dismissed Plaintiff's prayer for injunctive relief because Plaintiff had failed to
16 "allege [a] threat of repeated injury" (Order at 7).

17 Plaintiff has done nothing in her FAC to remedy this deficiency, nor can she.
18 *See Stickrath v. Globalstar, Inc.*, 527 F. Supp. 2d 992, 997 (N.D. Cal. 2007)
19 (holding plaintiffs lacked standing for injunctive relief where plaintiffs did not
20 allege current subscription nor intent to subscribe to defendant's services in future).
21 To the contrary, Plaintiff alleges multiple times that she would not have come to
22 LensCrafters and purchased her eye exam or eyewear had she known "that her eye
23 examination would not be comprehensive" or performed by an "independent doctor
24 of optometry." (FAC ¶¶ 90-92.)

25 Plaintiff's allegations therefore establish that she is virtually certain not to be
26 harmed again by Defendants' conduct. *Burns v. Tristar Prods., Inc.*, No. 14-cv-
27 749-BAS (DHB), 2014 WL 3728115, at *3 (S.D. Cal. July 25, 2014) (dismissing
28 injunctive relief claims under UCL and CLRA for lack of Article III standing where

1 plaintiff failed to allege she intended to purchase defendants' product in future and,
2 in fact, alleged she would not have purchased product had she known its quality);
3 *Castagnola v. Hewlett-Packard Co.*, No. C 11-05772 JSW, 2012 WL 2159385, at
4 *5-6 (N.D. Cal. June 13, 2012) (dismissing plaintiffs' claim for injunctive relief
5 because even if plaintiffs had alleged that they would purchase from Snapfish in the
6 future, plaintiffs' knowledge of Snapfish's terms and conditions did not "show[] a
7 realistic threat they would be harmed by [d]efendants' conduct in future").

8 Thus, for the same reasons the Court dismissed Plaintiff's prayer for
9 injunctive relief in her initial complaint, so too should Plaintiff's prayer for
10 injunctive relief in her FAC be dismissed.

11 **E. Plaintiff Fails to State a CLRA, FAL, or UCL "Unfair" or**
12 **"Fraudulent" Claim With Particularity.**

13 Plaintiff is required but fails to plead her CLRA, FAL, and UCL "unfair" and
14 "fraudulent" claims ("misrepresentation claims") with particularity under Rule 9(b).
15 Plaintiff's misrepresentation claims are based on Plaintiff's allegations that
16 Defendants (1) falsely advertise "independent doctors of optometry"; and (2)
17 mislead consumers into believing they will receive "comprehensive eye exams."
18 (*See, e.g.*, FAC ¶¶ 110-114, 120-122, 126-127, 138.1-139.) As such, Plaintiff must
19 satisfy Rule 9(b)'s heightened pleading requirements by alleging the "who what,
20 when, where, and how" of the misrepresentations charged. *See Kearns*, 567 F.3d
21 at 1125-27 (UCL and CLRA claims grounded in fraud must be pled with
22 particularity under Rule 9(b)); *Frenzel v. AliphCom*, No. 14-cv-03587-WHO, 2014
23 WL 7387150, at *7 (N.D. Cal. Dec. 29, 2014) (applying Rule 9(b) to UCL, CLRA,
24 and FAL claims sounding fraud).

25 In *Kearns*, the Ninth Circuit dismissed plaintiff's CLRA and UCL claims
26 sounding in fraud where plaintiff did not specify (1) the content of purportedly
27 misleading advertisements and sales materials, (2) when he was exposed to
28 misrepresentations, and (3) which misrepresentations he found material and upon

1 which he relied. *Kearns*, 567 F. 3d at 1125-26; *see also Brazil v. Dole Food Co.*,
2 935 F. Supp. 2d 947, 964 (N.D. Cal. 2013) (dismissing UCL, FAL, and CLRA
3 claims where plaintiff's complaint did not "clearly indicate the content of the labels
4 upon which Brazil allegedly relied when making his purchases or the
5 advertisements and website statements that he saw and supposedly found
6 misleading").

7 Similarly, in *Frenzel*, the court dismissed CLRA, UCL, and FAL claims as
8 insufficiently pled under Rule 9(b) where plaintiff alleged a number of specific
9 representations but "fail[ed] to specify which, if any, of the[] statements [plaintiff]
10 personally reviewed and relied on." 2014 WL 7387150, at *10. The court found it
11 insufficient that plaintiff broadly alleged he "reviewed [defendant's] marketing
12 materials and representations, and that he purchased his second generation Jawbone
13 UP based on those representations." *Id.* (internal citation and quotation marks
14 omitted). The court also found plaintiff's allegation that he "reviewed [defendants'
15 advertisements] before purchasing his Jawbone UP device" insufficient because
16 there was "no indication as to how long before the purchase his review occurred."
17 *Id.* at *11.

18 Here too, Plaintiff's misrepresentation claims suffer from the same fatal flaw
19 as in *Frenzel* and *Kearns*: Plaintiff generally alleges that she viewed Defendants'
20 "representations on its website and in its advertising regarding the availability of
21 comprehensive eye examinations from 'Independent Doctors of Optometry'" (FAC
22 ¶ 81), but she does not state which particular advertisements she viewed, what they
23 specifically said, or when she viewed them. This is particularly problematic
24 because Plaintiff does not actually allege that Defendants advertise "comprehensive
25 eye exams"; rather, she alleges that the amalgamation of various advertisements
26 about the importance of eye exams for eye health lead consumers to believe they
27 will receive a "comprehensive eye exam." (*See, e.g.*, ¶¶ 52-56.2.) Yet Plaintiff
28 does not allege which of Defendants' advertisements she viewed that gave her this

1 impression.

2 It is Plaintiff's burden to provide the specifics of which representations she
3 viewed and on which she relied so that Defendants can properly defend against her
4 claims. *See Vess*, 317 F.3d at 1106 (particularity is required so defendants can
5 "defend against the charge and not just deny that they have done anything wrong."
6 (internal citation and quotation marks omitted)). Plaintiff's conclusory allegations
7 do not satisfy Rule 9(b)'s heightened pleading requirements.

8 **F. Plaintiff's Misrepresentation Claims Should be Dismissed to The**
9 **Extent They Rely on Alleged Misrepresentations Regarding**
10 **Comprehensive Eye Exams.**

11 Plaintiff's misrepresentation claims further fail to the extent they are based
12 on Defendants' purported misrepresentations regarding the availability of
13 comprehensive eye exams. Statements are actionable under the UCL, CLRA, or
14 FAL only if they are likely to deceive a reasonable consumer. *See Ford v. Hotwire,*
15 *Inc.*, No. C-07-CV-1312 H (NLS), 2008 WL 5874305, at *4-5 (S.D. Cal. Feb. 25,
16 2008) (dismissing CLRA, FAL, and UCL claims where no reasonable consumer
17 was likely to be misled by defendants' advertising). "[L]ikely to deceive" requires
18 that the deception is "probable" and not "merely possible." *Lavie v. Procter &*
19 *Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003); *Ford*, 2008 WL 5874305, at *3.

20 Plaintiff does not even allege that Defendants advertise "comprehensive eye
21 exams" let alone that a reasonable consumer would likely view Defendants'
22 advertisements, believe they would receive a "comprehensive eye exam," and be
23 misled by such a representation. Plaintiff suggests that, by advertising the
24 importance of eye exams for eye health, Defendants mislead consumers into
25 believing they will receive a comprehensive eye exam. (FAC ¶¶ 52-56.2.) Plaintiff
26 asserts without support that the concept of a "comprehensive eye exam"
27 incorporates a standard of care that "should include visual-acuity tests, color-
28 blindness tests, 'cover' tests, retinoscopy, refraction, autorefraction or aberrometers,
slit-lamp examination, Gluacoma test, pupil dilation, [and] visual-field tests." (*Id.* ¶

60.) Plaintiff speculates that such an exam “conducted according to the standard of care by a reasonably diligent physician should take at least 30 to 45 minutes.” (*Id.*) She now claims she did not receive a comprehensive eye exam because the exam was hurried, the optometrist did not perform certain tests, and a lay employee performed aspects of the exam. (*Id.* ¶ 85.)

But Plaintiff offers no facts to support her conclusory allegations. For example, she does not allege an objective or plausible definition of “comprehensive eye examination” to establish that a reasonable consumer would impart the same meaning—with all the intricacies Plaintiff alleges—to the phrase. *See Pelayo v. Nestle USA, Inc.*, 989 F. Supp. 2d 973, 978-80 (C.D. Cal. 2013) (dismissing claims where plaintiff could not point to any source, including dictionary or Food and Drug Administration guidance, to support her definition of “all natural”); *Brod v. Sioux Honey Ass’n, Co-op*, 927 F. Supp. 2d 811, 828-29 (N.D. Cal. 2013) (dismissing claim where plaintiff failed to “cite a single source” to establish consumers would be misled into believing that “Sue Bee Clover Honey” contained pollen). Indeed, there is no legal standard or minimum requirement in California for an eye exam.

Nor does she plausibly allege that a reasonable consumer would likely expect *all* aspects of an eye exam—even basic tests—to be performed solely by an optometrist, particularly when California law permits lay employees to perform aspects of the exam under an optometrist’s supervision and responsibility. *See* Cal. Bus. & Prof. Code § 2544 (allowing for visual acuity, visual field, and tonometry to be performed by assistants under supervision and responsibility of an optometrist). Courts have dismissed claims to the extent they rely on insufficient legal theories. *See Johnson v. Wells Fargo Home Mortg. Inc.*, No. EDCV 13-01044-VAP (OPx), 2013 WL 7211905, at *9 (C.D. Cal. Sept. 13, 2013) (dismissing claims under Fair Credit Reporting Act and California Consumer Credit Reporting Agencies Act to the extent they relied on theory that failed as a matter of law); *Hoang v. Vinh Phat*

1 *Supermarket, Inc.*, No. CIV. 2:13-00724 WBS GGH, 2013 WL 4095042, at *12-13
2 (E.D. Cal. Aug. 13, 2013) (dismissing claims to the extent they relied on alter ego
3 theory for recovery). Likewise, any claims based on the alleged (and non-existent)
4 representations regarding “comprehensive eye exams” should be dismissed. No
5 reasonable consumer would understand them as Plaintiff purportedly did or find
6 them deceptive. To the extent based on purported misrepresentations regarding so-
7 called comprehensive eye exams, the claims should be dismissed.

8 **V. CONCLUSION**

9 For the foregoing reasons, Defendants LRNA and EECA respectfully request
10 that the Court dismiss Plaintiff’s complaint in its entirety.

11 Dated: June 8, 2015

Respectfully submitted,

12 CROWELL & MORING LLP
13

14
15 By: /s/ Steven D. Allison
Steven D. Allison

16 Attorneys for Defendants
17 Luxottica Retail North America Inc. and
EYEXAM of California, Inc.
18 sallison@crowell.com
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to Rule 5.2 of the Local Civil Rules of Practice for the United States District Court for the Southern District of California, I hereby certify under penalty of perjury under the laws of the United States of America that on June 8, 2015, a true copy of the above document was filed through the Court's Electronic Case Filing system and served by that system upon all individuals registered in the system in the above-captioned case. I further certify that a true copy of the above document was served by electronic and/or first-class mail upon all non-registered parties to the case.

By: s/ Steven D. Allison
Steven D. Allison

Attorneys for Defendants
Luxottica Retail North America Inc. dba
LensCrafters and EYEXAM of California, Inc.
sallison@crowell.com